

**IN THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

CA NUMBERS 397/399 of 2003
OS NUMBER s11537/s84 of 2002

CALLUM ROSS HENRY

Appellant

-and-

DIRECTOR OF PUBLIC PROSECUTIONS QUEENSLAND

Respondent

Submissions on behalf of the Appellant

1. Callum Ross Henry is the Appellant in each appeal: [Appeal 399 of 2003 (Wilson J) (“App #1”) and Appeal 397 of 2003 (Mackenzie J) (“App #2”)]. Both are listed for hearing on 29 January 2003.

Jurisdiction

2. The Appellant was refused bail by Wilson J on 20 December 2002¹ and Mackenzie J on 9 January 2003.² It has been held by this Court that appeals from such refusals are to be determined in conformity with the principles stated in *House v The King* (1936) 55 CLR 499.³

“It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.”⁴

¹ App #1 **R9**

² App #2 **R18**

³ *Scrivener v The DPP* [2001] QCA 454 per McPherson JA at paras. 8 and 10.

⁴ *House v The King* per Dixon Evatt and McTiernan JJ at 504-505

The facts

3. On or about 26 October 2002 the Applicant was charged with dangerous driving causing death and unlicensed driving as a result of a collision that occurred on Pinelands Road, Sunnybank on 22 November 2000 between the semi-trailer he was driving and a 9 year old child. The materials disclose that:
 - 3.1. The Applicant is 27 years old having been born on 19 April 1975. He was 25 years old at the time of the collision.⁵
 - 3.2. He was driving a semi-trailer.⁶ The Police Senior Collision Analyst has opined that:⁷
 - 3.2.1. The semi-trailer was travelling at about 64 km/h at the time of hitting the child and travelling at about 78 km/h at the commencement of braking.⁸
 - 3.2.2. The approximate distance from the point of impact to when the driver commenced to react and brake was about 63 metres.⁹
 - 3.2.3. The semi-trailer skidded for about 20 metres.¹⁰
 - 3.3. The speed limit in the area is 70 km/h.¹¹
 - 3.4. The Applicant approached the intersection at slightly above the speed limit.¹² He started braking about 63 metres before the intersection. His reaction time has been estimated at about three seconds which would suggest that the braking started whilst the lights facing him were probably still amber.¹³
 - 3.5. The Applicant was not intoxicated.¹⁴
 - 3.6. As to the child's movements:
 - 3.6.1. The traffic light facing the Applicant turned red just when he went through;¹⁵
 - 3.6.2. The child was in a group of school children who appeared to be "mucking around" and in a hurry.¹⁶

⁵ App #1 **R30**: Date of birth is 19 April 1975

⁶ App #1 **R69**: The truck was unladen.

⁷ App #1 **R54 – 74**; App #2 **R67 – 87**: Exhibit "KM-2": Affidavit of Kylee Miller, 20 December 2002: Statement of R J Ruller, page 20.

⁸ App #1 **R74**; App #2 **R87**: Ruller

⁹ App #1 **R74**; App #2 **R87**: Ruller

¹⁰ App #1 **R71**; App #2 **R84**: Ruller

¹¹ App #1 **R31**; App #2 **R44**: Police QP9

¹² App #1 **R74**; App #2 **R87**: i.e. travelling at approximately 78 km/h in a 70 km/h zone

¹³ App #1 **R71**; App #2 **R84**: Statement of RJ Ruller, page 20

¹⁴ App #1 **R34**; App #2 **R47**: Police QP9 form.

¹⁵ App #1 **R97-98**; App #2 **R110-111**: Statement of Peter David Stefancic (Student/Pedestrian): Exhibit "KM-8": Affidavit of Kylee Miller, 20 December 2002

"I saw another car stop before the truck. The car wanted to turn right because of its blinker. It stopped on a light that was yellow turning red. I was looking for the green man when I saw Andrew walk out onto the road when the traffic light turned red. I saw the truck come through the lights when it turned red. (...) Then Andrew walked across without the green man and then they hit. (...) I didn't see the green man come on at all.

¹⁶ App #1 **R11**; App #2 **R94**: Statement of Kate Louise Doilibi (Adult/Motorist): Exhibit "KM-4": Affidavit of Kylee Miller, 20 December 2002

"While they were waiting on the footpath I saw the two boys nudging each other and mucking

- 3.6.3. He ran onto the road before the ‘green man’ pedestrian light was activated.¹⁷
- 3.6.4. He did not look before he went onto the road.¹⁸

4. These facts were not disputed before either Wilson J or Mackenzie J.

Considerations applicable to the grant of bail

5. The Applicant is *not* in a “show cause” position. Section 16 of the *Bail Act 1980* requires the court to consider whether there are unacceptable risks that the Appellant would, if released on bail:
- 5.1. fail to appear;
 - 5.2. commit an offence;
 - 5.3. endanger the safety or welfare of others; or
 - 5.4. interfere with witnesses.
6. In *Williamson v. DPP* [2001] 1 Qd R 99 Thomas JA observed at 103:

“No grant of bail is risk free. The grant of bail however is an important process in civilized societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to

around. I could hear lots of kids yelling. I think the kids were about 6 or 7 metres from my car. When I was watching the kids I saw one of the boys who I now know to be Andrew Underwood, jog away from the group, away from the lights, towards the city. I saw him look back at the group over his shoulder. I then saw him run towards the road and then onto the road. He was running really quickly. It looked like Andrew was running diagonally across the road away from the lights.”

- ¹⁷ App #1 **R94-95**; App #2 **R107-108**: Statement of Daniel Shane Williams (Student/Pedestrian): Exhibit “KM-7”: Affidavit of Kylee Miller, 20 December 2002:

“The green man comes on when you press the button, then all the cars stop and it goes green. I saw Andrew push the button. Me and Peter also pressed the button. It looked like it was about to turn because all of the cars had stopped and no-one was turning so there I thought it was going to change. The cars on the right and basically straight in front of us had stopped. The traffic that had stopped were the ones going up and down the main road. I had seen mainly all cars and a van on my right had stopped. Then Andrew just ran across the road and then a truck came past hit him. I did not see the green man come on. The traffic was stopped though. Andrew was just like he was jogging across the road. He was on his own but me and Peter were behind him. I took one step on the footpath but saw the truck coming right at the end. I waited to see when it stopped and then I’d go. So I didn’t cross the road. I didn’t see Andrew look around to see the truck before he stepped out. (...) The lights went red about 2 seconds before the truck came through.

- ¹⁸ App #1 **R89-90**; App #2 **R102-103**: Statement of Guido Mauricio Avila (Adult/Motorist): Exhibit “KM-6”: Affidavit of Kylee Miller, 20 December 2002:

“Then I noticed this boy with shorts and blonde hair and what seemed to be a black coloured backpack on his left shoulder. The first thing that brought my attention to him was that he had started walking across the road facing to the left, towards Sunnybank. I never saw him look behind him, as a precaution to cross the main road. He was about a third of the way from the footpath when I first saw him. I believe that he was about 20 feet from where I was sitting in my car. I saw a car pass behind him in the left lane as he was walking faster. I began to feel nervous because I sensed that the boy had placed himself in danger.”

protect citizens in those respects.”

Section 16(2)(a) – “the nature and seriousness of the offence”

7. Any offence which involves the loss of life is serious. The applicant was not licensed at the time of the offence.¹⁹ However the overall culpability alleged in the present case does not mean that a term of actual imprisonment must be imposed if he were to be convicted. [See comparables]. If an actual term of imprisonment was thought necessary it is unlikely that it would approach the 12 months that will elapse by the time a trial is conducted.²⁰

8. The maximum penalty for the indictable offence is 7 years.²¹ However, cases of dangerous driving attracts sentences (even when there have been tragic and fatal consequences to innocent bystanders) do not axiomatically involve custodial terms.²² Relevantly, it has been observed that:
 - 8.1. Per Thomas J in *R v. Lincoln Patrick Conquest* (unreported) CA 395 of 1995:

“The factors that would take a sentence further towards the maximum level would include the seriousness of the driving, callousness or attitude that falls in the murky area between recklessness and deliberate harm, the period for which the dangerous driving was sustained, the seriousness of the consequences to the victims, the seriousness of the offender’s criminal record (with particular emphasis upon his driving history and his attitude towards fellow citizens), and whether the offender has little prospect of rehabilitation.”

 - 8.2. Per McMurdo P in *Anderson* 1998 104 A Crim R 489 at 491:

“for an offence of this type, where alcohol is not involved as a causative factor; where there is no excessive speed and where the dangerous driving is constituted by inattention over a short period, a custodial sentence is not inevitable, although custodial sentences suspended after a short period of actual imprisonment are often imposed.”

¹⁹ App #1 **R18 & 35-36**; App #2 **R31 & 48-49**: Police QP9 form. He had been disqualified from driving for 7 months following a drink driving conviction on 10 January 1999 (BAC 0.13). He told police that he was unaware that he was unlicensed having wrongly assumed that his license had been restored upon the completion of the disqualification period. It had in any event expired on 18 September 1999.

²⁰ As a general rule of thumb it takes about 12 months from the time of arrest before a trial date can be obtained from the District Court.

²¹ Section 328A(4): *Criminal Code*.

²² Some are summarised in the dissenting judgement of Holmes J in *R v Manners, Ex parte the A-G* [2002] QCA 301. Others include: *R v Brown* [1994] 2 Qd R 182 [220 hrs community service, disqualified from driving for 3 years, no conviction recorded], *R v Cockram* (unreported) Newton DCJ 18 May 1995 [\$1000.00 fine and disqualification for 2 years, conviction recorded] and *R v Gesler* (unreported) Healy DCJ 14 October 1988 [70 hrs community service and disqualification for 2 years], *R v Grant Ex parte A-G* CA No 143 of 1998 [18mths imprisonment wholly suspended].

- 8.3. There is a category of culpable driving which is more than “momentary inattention” but which is still not “a deliberate course of dangerous driving”: *R v Grant Ex parte A-G* (unreported) CA No 143 of 1998.²³
9. It is acknowledged that the Court of Appeal has, in respect of seriously culpable driving, recently sought to increase the applicable “range” of penalties, “in accord”, it is said with “contemporary, reasonable community expectations”: *R v Wilde Ex parte A-G* [2002] QCA 501. However, the circumstances of this case are starkly different.²⁴

Section 16(2)(b) – “the character, antecedents, associations, home environment, employment and background of the defendant”

10. The applicant has a limited criminal history, but he has never been to gaol before.²⁵ He has supportive parents and further support is available from a member of his

²³ The Court (de Jersey CJ, Derrington J) did not interfere with a wholly suspended term of 18 months. *Grant* was driving at about 80 km/h through a built up area and drove through a red light on a wet night. He skidded through the intersection and killed the passenger. He was 17 at the time and 20 at the time of sentence. Delay in prosecution was a factor although there were subsequent convictions for speeding.

²⁴ The circumstances in *Wilde* were far more culpable:
“At about 6.15 am on 12 January 2002, she was, as sole occupant, driving a stolen vehicle in fine weather in Bermuda Street, Mermaid Waters, which is a four lane road with two lanes in each direction. The vehicle being driven by the respondent collided with a group of cyclists, killing Luke Harrop and injuring Craig O’Connell. The cyclists were travelling in a 1.9 metre wide lane adjacent to the vehicle lanes, and separated from them by a single unbroken line. The respondent was seen to be driving erratically prior to the collision. At an intersection controlled by lights 1,350 metres back, the respondent failed to move off promptly as the light changed to green. She was fiddling about on the front passenger side floor of the car or seat. When she did move off, she overtook a Mr Alcock’s vehicle and cut in front of him without indicating. The respondent was still looking down and not attending to the road ahead. Her vehicle swerved in and out of her lane. She came to the vicinity of the group of cyclists. Nearing the front riders, Mr Harrop and Mr O’Connell, the respondent’s vehicle straddled two lanes. She then over-corrected to the left and struck the cyclists wholly within the cyclists’ lane. Mr Harrop was catapulted 18 metres through the air and over a cement barrier. The respondent did not apply her brakes before hitting Mr Harrop. Her vehicle then skidded 8.6 metres before colliding with Mr O’Connell and catapulting him also about 18 metres from the point of impact. Mr Harrop died as a result of the injuries he suffered in the collision. Mr O’Connell suffered a fracture of the right heel bone and lacerations and abrasions. The respondent stopped briefly following the collision, but did not leave her car. Then she drove off. Other motorists who had witnessed the collision followed her vehicle, attempting to have her stop. She refused, travelling at excessive speeds and through a red light at an intersection. She eventually stopped at Carrara. Two of the witnesses approached her and endeavoured unsuccessfully to detain her. She was verbally aggressive and left.”

²⁵ App #1 **R24-28**; App #2 **R37-41**: Criminal history and App #1 **R18**; App #2 **R31**: para 18 Affidavit of Applicant, 17 December 2002

extended family who resides in Brisbane.²⁶ He has a young child.²⁷ Given the course of recent events (see affidavit of Robert Ashley Henry)²⁸ it is sought that the Applicant be permitted to reside in a responsible domestic household. There is some prospect that he may be able to procure paid employment and that his infant child will be brought to Australia to permit some bonding.²⁹

Section 16(2)(c) – “previous grants of bail”

11. Pending the extradition hearing, the Appellant was on bail which he honoured.³⁰ He has not previously breached any bail condition nor has he ever failed to appear.³¹

Section 16(2)(d) – “strength of the evidence against the defendant”

12. In assessing the likelihood of conviction in the event that the applicant were to proceed to trial, regard must be given to:
- 12.1. The absence of any evidence of intoxication.³²
 - 12.2. The absence of excessive speed.³³
 - 12.3. The evidence of braking 63 meters from the intersection.³⁴
 - 12.4. The absence of any evidence of erratic driving or skylarking preceding the collision or intention to cause “deliberate harm”: c.f. *Conquest* (supra).³⁵
 - 12.5. The evidence that the traffic lights were amber when he started braking.
 - 12.6. The documented contributory behaviour of the child as noted above.
 - 12.7. The appropriate and cooperative approach to the investigation: c.f. *Wilde*.³⁶
13. The accounts attributed to the Applicant in the material are:

“I was driving along Pinelands Road in the middle lane. As I came to the lights, I saw that they were green so I went through them. Suddenly a kid ran across in front of me and I jammed on and tried to swerve into the right lane but it was too late and I couldn’t avoid him.”³⁷
and,

²⁶ App #1 **R20-21**; App #2 **R33-34**: Affidavit of Alan Phillips, 18 December 2002.
²⁷ App #2 **R124** Subject to financial considerations, his family will join him in Australia if he is granted bail. Affidavit of Kylee Miller, 9 January 2003, para 2(i).
²⁸ App #2 **R121-122**
²⁹ App #1 **R20-21**; App #2 **R33-34**: Paras 4 & 6, Affidavit of Alan Phillips, 18 December 2002
³⁰ App #1 **R14**; App #2 **R27**: Para 13, Affidavit of the Applicant 17 December 2002
³¹ App #1 **R18**; App #2 **R31**: Para 19, Affidavit of Applicant, 17 December 2002
³² App #1 **R30-36**; App #2 **R43-49**:
³³ App #1 **R32**; App #2 **R45**: Police QP9.
³⁴ App #1 **R31-32**; App #2 **R44-45**: Para 3 & 11, police QP9.
³⁵ App #1 **R31-32**; App #2 **R44-46** Police QP9
³⁶ App #1 **R32**; App #2 **R45**: Para 11, police QP9 & App #1 **R12**; App #2 **R25**: Para 3, Affidavit of the Applicant 17 December 2002
³⁷ App #1 **R103**; App #2 **R116**: Exhibit “KM-9”: Affidavit of Kylee Miller, 20 December 2002: Statement of Dean Lyle Beaumont, page 4.

“(…) he came down the hill, and the lights were green. As he got to the lights they changed to amber, and I saw a kid on the side of the road, run out from the side of the road. Also saw a girl start to run, then hesitate and then run back. The boy continued and I couldn’t stop. I braked and tried to swerve and I hit him on the corner of the truck.”³⁸

14. The Appellant’s conviction is far from inevitable and as Mackenzie J observed it is a “live” issue.

Reasons for refusal – Wilson J

15. Wilson J refused bail after finding that there was a “considerable risk of failing to appear” and not being satisfied “that the risk of the commission of further offences is an acceptable one.”³⁹ As to the first finding Her Honour pointed to the Appellant’s ties to New Zealand, the disputed co-operation with the police and his remaining in New Zealand and contesting extradition proceedings. As to second finding Her Honour pointed to the Appellant’s “bad traffic record”⁴⁰ and the conviction for disqualified driving in New Zealand subsequent to the subject collision.
16. The proceedings before both Wilson J and Mackenzie J have been hampered to some extent by the overstatements and omissions in the police QP9 forms and in the Arresting Officer’s Objection to Bail affidavit⁴¹. The difficulties have been compounded by the Respondent’s reliance on these matters in submissions.⁴² Simply put, there was never any proper basis to suggest that the return to New Zealand was an act of “flight”. The suggestion to that effect in the Objection to Bail affidavit⁴³ by the arresting officer was plainly inconsistent with her own sworn statement.⁴⁴

³⁸ Exhibit “KM-10”: Affidavit of Kylee Miller, 20 December 2002; Synopsis by Donohue, page 1-2

³⁹ App #1 **R10**

⁴⁰ App #1 **R10**

⁴¹ App #1 **R37-40**; App #2 **R50-53**:

⁴² App #1 **R5-7; 117-118**; App #2 **R13-16; 137-140**:

⁴³ App #1 **R38**; App #2 **R51**:

⁴⁴ Moreover the failure by the Respondent [and police] to place material before the magistrate and both judges of any of the independent evidence of the child’s movements gave a misleading impression as to the facts.

17. Unfortunately, Wilson J thought it unnecessary to decide this dispute.⁴⁵ That was a clear error as this was the primary basis that the Respondent relied upon to suggest a risk of the Appellant failing to appear, a risk that Her Honour embraced as considerable.
18. Furthermore Her Honour offered as a reason for declining bail the unacceptability of the risk of re-offending. Such a finding is difficult to rationalise. The alleged offence is not one attached to an untreated addiction or condition which might justify such a concern, and in any event a prohibition from driving as a condition of bail would have adequately addressed the concern. Her Honour also failed to have regard to the fact that the Appellant is at substantial risk of serving more time on remand than he would expect to receive in the uncertain event of being convicted.⁴⁶
19. In summary, it is submitted that Her Honour's discretion miscarried as follows:
 - 19.1. in failing to find that the assertion in the Objection to Bail affidavit that the Appellant "fled", was ill founded.⁴⁷
 - 19.2. in wrongly regarding the resistance to extradition by the Appellant as a factor pointing to a risk of the Appellant failing to appear;
 - 19.3. in finding that there was a relevant risk of re-offending;
 - 19.4. in failing to take into account the length of time for which the Appellant would be on remand as compared with that which might ultimately be served as part of a sentence; and
 - 19.5. in reversing the onus upon the Appellant in effect requiring him to satisfy the Court that any risk of re-offending was acceptable when the Act requires a Court to grant bail unless it has been demonstrated that such risks are unacceptable.⁴⁸

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⁴⁶ App #1 **R8-10**
Lewandowski v Sherman 2002 WASC 239 (14 October 2002) per Hasluck J: "A judicial officer must obviously be conscious that a lengthy period of detention prior to trial for a person who has not been convicted of any offence can give rise to an injustice. It is incumbent on the State to provide the resources necessary to minimise the risk of an injustice in respect of a person who is at law presumed innocent to the charge."

⁴⁷

App #1 **R38**; App #2 **R51**: Incidentally Mackenzie J was satisfied that the evidence clearly established that the Appellant properly notified the police of his intended movements and contact details: App #2 **R8-10**:

⁴⁸

See sections 9 and 16 of the *Bail Act* 1980.

Reasons for refusal – Mackenzie J

20. His Honour found that there was an unacceptable risk of the Appellant failing to appear.⁴⁹ In His Honour's reasons it was observed:

“There is a cash deposit of \$15,000.00 offered by way of surety, in addition”;⁵⁰

and

“Nor do I generally think that a deposit of money is necessarily a deterrent to absconding if a person is minded to do so. Quite often, in any event, the person who put the bail up is able to persuade Courts that he should be relieved from the sins of the absconder.”⁵¹

21. In argument the following exchange took place on the issue:⁵²

Ms Ram (for the Respondent below): “Your Honour, there's the next issue of the surety. The question is, how does one enforce a surety for someone who resides overseas?”

Mr Boe (for the Appellant below): “I've asked for a cash deposit, not a surety.”

His Honour: “It's a cash deposit, it is? Yes.

Mr Boe: “So the Crown can get it straight away.”

His Honour: Yes, okay, well, if it's a cash deposit, it's not such a problem. Certainly there would be some difficulties if it was to execute on property – real property in New Zealand, or something like that I would imagine. Yes, okay. Next one. Any other submissions?

22. Section 11(1) of the *Bail Act* 1980 provides:

11 Conditions of release on bail

(1) A court or police officer authorised by this Act to grant bail shall consider the conditions for the release of a person on bail in the following sequence—

(a) the release of the person on the person's own undertaking without sureties and without deposit of money or other security;

(b) the release of the person on the person's own undertaking with a deposit of money or other security of stated value;

(c) the release of the person on the person's own undertaking with a surety or sureties of stated value;

(d) the release of the person on the person's own undertaking with a deposit of money or other security of stated value and a surety or sureties of stated value; but shall not make the conditions for a grant of bail more onerous for the person than those that in the opinion of the court or police officer are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.

23. The Appellant was offering to comply with a condition under subsection 11(1)(b) i.e. a cash deposit.⁵³ Sections 32, 32A & 32B of the Act provide:

32 Forfeiture of deposit or other security

(1) Where an undertaking that has been declared forfeited because of the failure of the person released on bail to appear in accordance with the undertaking contains as a condition of bail the making of a deposit of money or other security, the court that declares the forfeiture may order

⁴⁹ App #2 **R23**:

⁵⁰ App #2 **R19**:

⁵¹ App #2 **R21**:

⁵² App #2 **R15**:

⁵³ App #2 **R122**:

that the deposit or other security so made be forfeited and paid to Her Majesty.

(2) The court shall endorse or cause to be endorsed on the undertaking particulars of every order made pursuant to this section.

32A Order for payment of amount under forfeited undertaking

(1) A court that orders the payment of an amount under section 32 for which there is a surety must also order—

(a) that the surety pay the amount undertaken by the surety to be paid on the forfeiture of the undertaking to the proper officer of the court immediately or within the time or by the instalments stated in the order; and

(b) that in default of payment of the amount, the surety be imprisoned for the term, of not more than 2 years, stated in the order.

(2) If all or part of the amount remains unpaid after the time allowed by the court, the proper officer may register the amount under the *State Penalties Enforcement Act 1999*, section 34. 36

32B Variation or revocation of order forfeiting bail undertaking

(1) If a court orders a defendant or a surety to pay an amount under section 32 or 32A, the defendant or the surety may apply in the approved form to the court that made the order or, for a Magistrates Court, any magistrate, for an order revoking or varying the order.

(2) The application—

(a) may only be made on the ground that, having regard to all the circumstances, it would be against the interests of justice to require the person to pay the amount ordered to be paid; and

(b) must be made within 28 days after the relevant undertaking is forfeited or the longer time the court allows for payment of the amount; and

(c) must briefly state the circumstances relied on; and

(d) must be filed with the proper officer of the court and served, at least 14 days before the date set for the hearing of the application, on the complainant or, for an undertaking entered into after an indictment is presented, whoever of the following is relevant—

(i) the State crown solicitor;

(ii) for an offence against a law of the Commonwealth, the Australian Government Solicitor in Queensland.

24. Sections 32A and 32B were inserted into the Act on 27 November 2000. They reflect section 15 of the *Crown Proceedings Act 1980* which has been repealed. Section 15 was considered by Williams J (as His Honour then was) in *Ex Parte Doueihy* 1986 2 Qd R 352. At 359 His Honour observed:

“Her undertaking was (to use the description of Lord Widgery) a “serious obligation”, and in my view that obligation is central to the philosophy of admitting an accused person bail. Section 9 of the Bail Act provides that the Court shall in certain circumstances grant bail to a person awaiting trial. Frequently such an order will only be made where there is a surety – the responsibility for and custody of the defendant passing from the law into the hands of the surety. If the court regarded the surety’s obligation lightly and granted relief from forfeiture of a recognizance merely because it was said that there was little the surety could have done to prevent the defendant absconding the whole purpose of requiring a surety would be undermined.”

25. In *Baytieh v The State of Queensland* [1999] QCA 466 this Court held:

“It may be accepted that the circumstances will be rare in which it would be against the interests of justice to require the person indebted to pay any part of the amount ordered to be paid, given the importance of ensuring the integrity of the surety system.”

26. The term “against the interests of justice” has been retained in section 32B.
27. Mackenzie J has thus acted “upon a wrong principle” and allowed “extraneous or irrelevant matters to guide or affect him”. Firstly His Honour has failed to appreciate the distinction between a “cash deposit” which was being proposed and a “surety”. In the case of the former there has never been a provision that permitted the depositor to oppose forfeiture. Secondly, even in respect of sureties, whilst there is a provision permitting relief from forfeiture this Court has stated that the circumstances will be “rare” for such relief to be granted. Thirdly, it is contrary to established principle not to regard either a cash deposit or surety as an effective means of lowering the risk of failing to appear. Fourthly, there is no proper basis from which it could have been suggested that the Appellant relevantly manifests such a risk. He is not in a show cause situation.

Summary

28. Although it is submitted that both primary judges were in error (for the reasons outlined above) it is sufficient for the Appellant’s purposes if the exercise of the relevant discretion miscarried on either occasion.
29. Section 9 and 16 of the Bail Act 1980 provide that a person has a *prima facie* entitlement to bail.
30. Most people charged for dangerous driving causing death are served with a notice to appear and an application for bail is rarely opposed. Even if such application is opposed, bail will almost invariably be granted.
31. Proof of guilt in this case is problematic.
32. Even if guilt is proven the case remains one in which there is no excessive speed, intoxication, intentional recklessness nor any intention to do deliberate harm. There

is also some contributory conduct on the part of the deceased.

33. Taken at its highest for the Crown, the sentencing range which would be applicable to such a case is one which embraces non-custodial orders. Even allowing for the fact that a period of actual custody may be in the applicable range, it is unlikely to exceed or even equate with the period that the Appellant would spend on remand prior to trial.
34. The Appellant is a New Zealand citizen who returned home some time after the incident, but nonetheless informed police of his movements and maintained contact with them. When charged he engaged lawyers and followed their advice.
35. The current relevance of these facts is, at most, marginal. The Appellant has a supportive and responsible family and is responsible for an infant child. He has limited personal means and no passport. The question might be asked, rhetorically, “where could he go?”
36. The proposed draft order contains a set of conditions which would allay any reasonable concerns about the prospects that the Appellant will appear in accordance with his undertaking. Bail should be granted on these terms.
37. The Appellant is also entitled to his costs of and incidental to these appeals.

PJ Callaghan
Counsel for the Appellant

A Boe & P Morreau
Boe Callaghan
Lawyers for the Appellant

17 January 2003